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Supreme Court of the United States.

Brief of Amici Curiae Alameda County Public Defenders and California Public Defenders Association in Support of Respondent

2023 WL 6534993 | UNITED STATES OF AMERICA, Petitioner, v. Zackey RAHIMI, Respondent. | Supreme Court of the United States. (Approx. 27 pages)

v.

Zackey RAHIMI, Respondent.

No. 22-915.
October 3, 2023.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Brief of Amici Curiae Alameda County Public Defenders and California Public Defenders Association in Support of Respondent

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*1 INTEREST OF AMICI CURIAE [1]

The Alameda County Public Defenders represent thousands of clients annually. With a population of 1.67 million, Alameda County is the seventh most populous county in California. Our office is committed to fighting the mass incarceration and criminalization of our clients.

The State of California aggressively criminalizes the possession of firearms. We have seen that this disproportionately affects people of color, particularly Black people. Since *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), we have litigated hundreds of motions seeking to bring California's expansive gun regulations in line with the Second Amendment. And we have found the difference between punishment and freedom often depends on how our courts interpret “law-abiding responsible citizens.” We have also seen our clients in California face criminal prosecution for violating civil disarmament orders that sweep far beyond domestic violence.

As to the particular statute at issue in this case, 18 U.S.C Section 922(g)(8), we acknowledge the need to protect people from domestic violence. Many of our clients are themselves victims of domestic violence. But we also have first-hand experience fighting the rote issuance of civil protective orders that deny our *2 clients their Second Amendment rights and lead to unjust, unequal criminal prosecutions.

The California Public Defenders Association (“CPDA”) is the largest organization of criminal defense attorneys in the State of California. CPDA's 4000-plus members include thousands of public defenders and defense attorneys who represent clients across the state, many of whom are accused of firearm violations, including unlawful possession of firearms. CPDA members have been actively litigating Second Amendment issues since the Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *Bruen.* CPDA has a strong interest in ensuring their clients' Second Amendment rights are protected.

For these reasons, the proper resolution of this case is a matter of significant interest to the Alameda County Public Defenders, CPDA and our clients.

SUMMARY OF ARGUMENT

In Section 922(g)(8), Congress criminalized the possession of firearms by individuals subject to certain domestic violence restraining orders. Based on the Court's decision in *Bruen*, the Fifth Circuit correctly held that Section 922(g)(8) violates the Second Amendment. *See United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023). To try to save the statute, the government makes two arguments that would encroach upon Second Amendment rights far beyond the context of Section 922(g)(8). First, the government defends the ***3** law by invoking a sweeping power to restrict Second Amendment rights to anyone not deemed "a law-abiding, responsible citizen." Br. of the United States at 7-15 ("U.S. Br"). Second, the government argues that Section 922(g)(8) has strict requirements, in common with restrictions throughout the United States, that confirm its constitutionality. U.S. Br. at 27-34. Both arguments are contrary to the Court's jurisprudence, and the lived experience of our clients.

There is no litmus test for Second Amendment rights that requires a threshold showing of being a member of a "law-abiding, responsible" citizenry. None can be found in the Court's jurisprudence. Nor would such test have a workable limiting principle. Many of our clients are acquitted, exonerated, or have their cases dismissed or diverted. They are no less deserving of the Constitution's protections than anyone else. Like the First and the Fourth Amendment, the Second Amendment operates to protect members of our political community from the government. Its protection should not turn on the caprice of a judge.

A second problem with the government's position is that it conflates a finding of dangerousness with issuance of a domestic violence protective order, and then claims that is sufficient to deprive people of Second Amendment rights. *See* U.S. Br. at 7. This is not a path that the Court should embark on. Indeed, California provides a cautionary tale on the perils of adopting the government's position. In California, people are routinely criminally prosecuted for conduct far broader than what Section 922(g)(8) proscribes. In the ***4** restraining order context, California has expanded the definition of a domestic relationship beyond intimate partner to include former cohabitants and relatives, including siblings and grandparents. Domestic abuse is not just physical; it also encompasses breaches of the peace. For example, domestic violence could include someone annoyingly sending a barrage of text messages seeking to reunite with an ex-partner.

Moreover, the California legislature has imposed a mandatory disarmament regime that spans far beyond domestic violence protective orders to include protective orders to prevent workplace harassment, quell disputes between neighbors, protect students at secondary campuses and regulate elder abuse. All these orders have inconsistent and ambiguous definitions of abuse. They operate to ban the possession of firearms regardless of whether used for hunting, protection, self-defense or in one's home. These statutes deprive an individual of their Second Amendment rights while they are subject to the order, and they criminalize violation of the civil protective order, punishable by up to one year's incarceration. This is true even if a firearm was not used in the conduct leading to the protective order. Disarmament orders in California are routinely issued, and extended, on an *ex-parte* basis. Even permanent restraining order hearings lack key procedural protections.

We represent clients who are criminally charged under these expansive protective order laws. Their prosecutions confirm the nearly limitless reach of this disarmament scheme, all on the theory that individuals ***5** subject to these protective orders pose an unreasonable risk to public safety. A person subject to any of these orders cannot defend themselves against an armed intruder in their own home.

If the Court were to endorse the government's novel view that protective orders can be a basis to deem a citizen dangerous and strip their Second Amendment rights, California's experience has shown that this would lead to widespread disarmament after issuance of protective orders in mundane, everyday private disputes: workplace harassment orders, secondary school protective orders, and elder abuse protective orders.

California's expansive protective order disarmament regime cannot be reconciled with our nation's history or the Court's Second Amendment teachings. But the government's argument would pave the way for widespread adoption of California's model as there is no principled distinction between Section 922(g)(8) and California's myriad protective orders. We urge the Court to affirm.

***6** ARGUMENT

I. Because the Second Amendment Belongs to All Americans, One Does Not Have to First Qualify as a "Law-Abiding Responsible Citizen" in Order to Seek its Protections.

California courts have interpreted *Bruen* to mean that the Second Amendment protects *only* "law-abiding, responsible citizens" and that only "law-abiding responsible citizens" can raise a Second Amendment challenge. *People v. Alexander*, 91 CalApp.5th 469, 478-80 (2023). *See also People v. Odell*, 92 Cal.App.5th 307, 309 (2023); *In re D.L.*, 93 Cal.App.5th 144, 165-66 (2023) (*petn. for review pending); People v. Ceja*, 2023 WL 5602746, at *3 (Cal. Ct. App., Aug. 30, 2023) (*petn. for review pending); United States v. Serrano*, 2023 WL 2297447, at *10-11 (S.D. Cal., Jan. 17, 2023); *United States v. Perez-Garcia*, 628 F.Supp.3d 1046, 1052-54 (S.D. Cal. 2022), aff'd sub nom.; *United States v. Garcia*, 2023 WL 2596689 (9th Cir., Jan. 26, 2023).

In its petition for certiorari, the government likewise claims that "the right to keep and bear arms belongs only to 'law-abiding, responsible citizens."' Pet. for a Writ of Cert. at 10. Its merits brief argues that "[m]any aspects of Second Amendment doctrine rest upon the premise that the Amendment protects only law-abiding responsible citizens." U.S. Br. at 12. If the Court adopts this interpretation, the trial courts in which we practice every day will inevitably say that defendants must prove that they are "law-abiding" and "responsible" before they can raise a Second ***7** Amendment claim. This will be fatal to their success and the Second Amendment. The government's argument is inconsistent with the Court's precedent and unwise as a matter of policy.

A. The Phrase "The People" Unambiguously Refers to All Members of the Political Community, Not an Unspecified Subset.

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II (italics added).

In *Heller*, the Court ruled that the Second Amendment created an individual right to possess a firearm in one's home for self-defense. 554 U.S. at 635. In reaching this decision, Justice Scalia noted that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580.

Borrowing a quote from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), he explained:

> "'[T]he people' seems to have been a *term of art* employed in select parts of the Constitution.... [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the ***8** Ninth and Tenth Amendments, *refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.*"[2]

Heller, 554 U.S. at 580 (italics added).

Justice Stevens pointed out that, under this definition, *"even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions." Id.* at 644 (Stevens, J., dissenting) (italics added).

In *Bruen*, the Court extended *Heller* and ruled that the Second Amendment grants "the people" the right to bear arms for self-defense in public. 142 S. Ct. at 2122. The Court proclaimed that this right is entitled to the same majesty and "unqualified command" as the rest of the Bill of Rights. *Id.* at 2126.

Although the Court used the phrase "law-abiding, responsible citizens" throughout its opinion, it never suggested that it was narrowing *Heller's* definition of the "the people." And since "the criminal histories of the plaintiffs … were not at issue … the[] references ***9** to law-abiding, responsible citizens' were dicta."*Range v. Attorney General United States of America*, 69 F.4th 96, 101 (3d Cir. 2023). *See also id.* at 101 (explaining that the references

to "law-abiding, responsible citizens" in *Heller* and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) were also dicta); *United States v. Combs*, 2023 WL 1466614, at *3 (E.D. Ky., Feb. 2, 2023).

Most federal courts have either avoided or rejected the government's argument that Second Amendment protections apply only to "law-abiding, responsible citizens." *See United States v. Le*, 2023 WL 3016297 at *4 (S.D. Iowa, Apr. 11, 2023) ("Of the courts to have decided the issue directly, most appear to have concluded that 'the people' in the Second Amendment refers to all citizens, and thus any citizen who possesses a firearm of a type in common use has satisfied *Bruen's* first step."); *United States v. Silvers*, 2023 WL 3232605, at *6 (W.D. Ky, May 3, 2023) ("The overwhelming and consistent sway of precedent runs in the opposite direction" of the "Government's 'law-abiding citizen' argument …").

Range is illustrative. 69 F.4th 96. There, the Third Circuit ruled that "despite his [felony] conviction, [Range] remains among 'the people' protected by the Second Amendment." *Id.* at 98. The Third Circuit noted that *Heller* concluded that " 'the people' as used throughout the Constitution 'unambiguously refers to all members of the political community, not an unspecified subset.'" *Id.* at 101 *"So the Second Amendment right, Heller said, presumptively 'belongs to all Americans.'" Id.* (italics added).

10 B. Justice Barrett's Dissent in *Kanter v. Barr.

While sitting as a judge on the Seventh Circuit, Justice Barrett addressed the government's position in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), *abrogated by Bruen*, 142 S.Ct. 2111. After pointing out that its " 'scope of the right' approach is at odds with *Heller* itself," she explained that the problem with denying Second Amendment protection to certain groups of people - as opposed to "certain weapons or activities" - is that "a person could be in one day and out the next." *Id.* at 452-53 (Barrett, J., dissenting).

To illustrate the point, Justice Barrett used as an example a law similar to Section 922(g)(9). If such a law disqualified a person convicted of misdemeanor domestic violence "from possessing a gun for a period of ten years following release from prison," and - as the government now suggests - the "justification for the initial deprivation is that the person falls outside the protection of the Second Amendment" - that person would *never* have standing to challenge any law - even a patently unconstitutional one - under the Second Amendment. *Id.* at 452. This would be true "[d]espite the legislative judgment that such a person could safely possess a gun after ten years" because "[i]f domestic violence misdemeanants are out, they're out." ***Id.***

***11 C. California Courts Have Used the Government's Position to Short Circuit *Bruen's* Second Amendment Analysis.**

Justice Barrett's analysis foreshadowed the problem we now face. California courts are using the government's "scope of the right" argument to short circuit the standard of review the Court laid out in *Bruen. See Serrano*, 2023 WL 2297447, at *10-11; *Perez-Garcia*, 628 F.Supp.3d at 1052-54; *Alexander*, 91 Cal.App.5th at 478-80; *Odell*, 92 Cal.App.5th at 309; *In re D.L.*, 93 Cal.App.5th at 165-66; *Ceja*, 2023 WL 5602746, at *3.

These courts have ruled that if a defendant cannot satisfy a judge at the outset that they are "law-abiding responsible citizens," the court can find that the "plain text of the Second Amendment does not cover their individual *conduct*, thereby bypassing the "legal heavy lifting,"[3] necessary to determine whether the regulation "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2129-30 (italics added).

In our view, it would be a mistake for the Court to endorse this transparent attempt to circumvent its own holding. *Heller* and *Bruen* stand for the principle that the Second Amendment confers an "individual" right that "belongs to all Americans." *Heller*, 554 U.S. at 580-81.

Bruen instructs that the government has the power to "disable the exercise of [that] right," *United ***12** States v. Sitladeen*, 64 F.4th 978, 986 (8th Cir. 2023), but only if the individual's *conduct* is not covered by the Second Amendment's plain text or the regulation is consistent with our historical tradition. *Bruen*, 142 S.Ct. at 2129-30 (italics added).

If the Court meant what it said, the first step of this analysis looks only at the individual's conduct - not their "classification" or "status." *See* *Sitladeen*, 64 F.4th at 987; *United States v. Jackson*, 622 F.Supp.3d 1063, 1066 (W.D. Okla., Aug. 19, 2022). It is not until the second step that the court looks to history to see if there is a valid basis for disabling the individual's Second Amendment rights. *See* *United States v. Quiroz*, 629 F.Supp.3d 511, 516 (W.D. Tex. 2022); *United States v. Goins*, 2022 WL 17836677, *7 (E.D. Ky, Dec. 21, 2022).

If this analysis is indeed correct, the government's concentration upon "law-abiding" and "responsible" citizens will often be a factor in the second step of the *Bruen* inquiry. But it cannot be used to disqualify defendants before they even get to the first step.

D. The Government's Argument Will Produce Aberrant and Idiosyncratic Results That Will Reduce Public Confidence in the Judicial System.

In practice, the government's position will produce anomalous and inconsistent results. The Court has long held that even convicted felons retain rights under the First and Fourth Amendments. *See* *Holt v.* ****13*** *Hobbs*, 574 U.S. 352 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *United States v. Rowson*, No. 22 CR. 310 (PAE), 2023 WL 431037, at *15-19 (S.D.N.Y. Jan. 26, 2023) (and cases cited therein). And as *Heller* pointed out, the phrase "the people … unambiguously refers to all members of the political community, not an unspecified subset" in all six of the constitutional provisions that mention it. 554 U.S. at 580. If the meaning of the phrase does not vary from amendment to amendment - as history and *Heller* suggest - restricting its meaning to "law-abiding" and "responsible" citizens would not only endanger other constitutional protections but also produce absurd results. *See* *Range*, 69 F.4th at 102; *United States v. Perez-Gallan*, 640 F.Supp.3d 697, 708 (W.D. Tex. 2022), aff'd, No. 22-51019, 2023 WL 4932111 (5th Cir. Aug. 2, 2023).

For example, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969), the Court reversed a civil rights leader's conviction for leading a peaceful march that was in direct violation of Birmingham's parading statute. It concluded that the "may issue" permit ordinance in effect at the time violated the First Amendment. *Id.* Under the rule proposed by the government in this case, Pastor Shuttlesworth could never have brought that challenge. Having violated Birmingham's ordinance, he was no longer a "law-abiding" citizen. *See* *Range*, 53 F.4th at 273 ("Those whose criminal records evince disrespect for the law are outside the community of law-abiding citizens entitled to keep and bear arms[.]'").

****14*** A criminal defendant could likewise be barred from seeking to suppress evidence under the Fourth Amendment if the court determined that his arrest and indictment rendered him either non-law-abiding or irresponsible. *See* *Perez-Garcia*, 628 F.Supp.3d at 1053-54 ("As a person who has been charged with a crime based on a finding of probable cause, [defendant] would not be considered a 'law-abiding' or responsible citizen, so he is outside the plain text of the Second Amendment.").

Even in states that have legalized the drug, a person who admitted using marijuana would, according to the government, be barred from raising First, Second or Fourth Amendment challenges because the use of marijuana remains a federal crime. *See* *Fried v. Garland*, 640 F.Supp.3d 1252 (N.D. Fla. 2022). So, too, would a senior citizen who committed a crime when they were eighteen years old.

The terms "law-abiding" and "responsible" also defy clear and workable definitions. U.S. Br. at 12. While there may be consensus on the nucleus of "law-abiding" (we can probably all agree that Charles Man-son was not "law-abiding"), the boundaries of that term depend upon individual moral values, which change over time, and are impossible to clearly draw. As the Third Circuit pointed out, the phrase is as expansive as it is vague. "Who are 'law-abiding' citizens in this context? Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to law-abiding, responsible citizens' do not mean that every ****15*** American who gets a traffic ticket is no longer among 'the people' protected by the Second Amendment." *Range*, 69 F.4th at 102. *See also* *Perez-Gallan*, 640 F.Supp.3d at 708.

"Responsibility" is an even more slippery concept. The debate over what it means to be personally "responsible" has not only divided generations and political parties, but parents and children as well.

For those of us on the front lines of the criminal legal system, a rule that leaves Second Amendment protections to the mercy of such mercurial principles will almost certainly result in chaos and inconsistency. While judges struggle to define "law-abiding" and "responsible," lawyers on both sides will forum shop for the judge who comes up with the definition that best suits their purpose. In the end, some defendants will be barred from raising a Second Amendment claim for marching in a protest or smoking marijuana while others will be allowed to bring a challenge despite their prior convictions. *See United States v. Bullock*, 2023 WL 4232309 (S.D. Miss., June 28, 2023) (finding 18 U.S.C. Section 922(g)(1) unconstitutional as applied to defendant with a 1992 conviction for aggravated assault and manslaughter).

The fate of these defendants will be determined not by a uniform rule of law, but by the moral code of the judge who heard their case. This disparity in results not only raises serious due process concerns, it strikes at the core of our legal system - the appearance of objectivity of the decision maker. *Williams-Yulee v.* ****16*** *Florida Bar*, 575 U.S. 433, 433 (2015) ("Public perception of judicial integrity is … 'a state interest of the highest order.'"); *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."); *Offutt v. United States*, 348 U.S. 11, 13 (1954) ("Justice must satisfy the appearance of justice.").

Limiting access to the Second Amendment to only those who can satisfy the judge's personal definition of "law-abiding, responsible citizens" will not only produce uneven and perverse results, it will also reduce confidence in the judicial system.

II. Disarming Citizens Based on Civil Protective Orders Lacks a Limiting Principle: California Is Proof that Disarmament Orders May Extend Beyond the Domestic Violence Context to Any Private Civil Dispute Where a Judge Finds a Threat or Danger.

The government claims that disarming citizens based on a domestic violence protective order complies with the Second Amendment. We believe it is unconstitutional and fails the Court's two-part test in *Bruen.* We represent many clients who are victims of domestic violence, and we are sensitive to the need to protect such victims. But there is no historical precedent for disarming individuals after issuance of domestic violence restraining orders. And there is certainly no history or tradition in this country of using civil protective ****17*** orders as a proxy to determine who can be disarmed as "violent."

California has far surpassed the federal government in its Second Amendment disarmament due to civil protective orders. We believe that California's experience demonstrates the fundamental problem with the government's position: it lacks a limiting principle. We have a unique vantage point on this problem, having routinely seen such orders issued based on conduct that does not amount to physical violence; and after hearings based on meager evidence that lacks sufficient procedural safeguards. California's experience provides a cautionary tale on the perils of expanding a civil protective order disarmament scheme - at the expense of cherished constitutional rights.

Like Section 922(g)(8), California criminalizes possession of firearms after issuance of a civil Domestic Violence Restraining Order ("DVRO"). *See* Cal. Fam. Code §§ 6300 *et seq.* (West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess., and urgency legislation through Ch. 211 of 2023 Reg. Sess.). A DVRO is not triggered by a criminal conviction, but by an individual petitioner submitting a form to the court alleging domestic violence. *See DV-100, Request for Domestic Violence Restraining Order*, Judicial Council of California (Jan. 1, 2023), https://www.courts.ca.gov/documents/dv100.pdf ("*DV-100*").

California's DVRO proscribes a far greater range of conduct than that proscribed by Section 922(g). First, our definition of a domestic relationship encompasses ****18*** more than intimate partners: a DVRO can be issued against nearly anyone who could be considered related by blood or marriage, or who one currently or previously cohabitated with, including co-parents. *See id.* at 2; Fam. § 6211. Second, our definition of domestic violence is far broader and includes a broad range of nonviolent behavior, including "disturbing the peace." *See* Fam. § 6320. This means that an individual can be the subject of a DVRO without ever assaulting or battering an intimate partner.

Restraining orders in California have proliferated far beyond the domestic violence context: judges routinely issue such orders to restrain neighbors, co-workers, students, and elder caregivers from contacting protected parties. For example, Civil Anti-Harassment Restraining Orders, a legal mechanism for private dispute resolution, provide another path for private individuals to use the courts to take away the Second Amendment rights of other citizens. *See* Cal. Civ. Proc. Code § 527.6 (West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess., and urgency legislation through Ch. 211 of 2023 Reg. Sess.). California's expansive list of protective orders also includes workplace restraining orders and orders restraining caregivers and students. *Id.* at §§ 527.8 and 527.85; Cal. Welf. & Inst. Code § 15657.03 (West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess., and urgency legislation through Ch. 211 of 2023 Reg. Sess.). Protective orders issued under these statutes all trigger firearm bans even if a firearm played no role in the alleged incident. These orders may be issued on a temporary basis and are often ***19** extended *ex-parte*. Even when the restrained party is present, procedural infirmities abound.

If the Court accepts the government's defense of Section 922(g)(8), and its requirement that an individual must first qualify as a "law-abiding" before deemed eligible for constitutional protection, this will open the door to an extension of a Second Amendment disarmament scheme far beyond domestic violence. The government's argument would mean that all states could regulate the disarmament of their citizens as aggressively as California, with no principled distinction between domestic violence protective orders and other ordinary civil protective orders.

A. California Law Is Broader Than Section 922(g)(8) in Terms of the Nature And Quality Of Protective Order Disarmament.

Unlike Section 922(g)8), which regulates firearm possession after issuance of permanent domestic violence restraining orders, California Penal Code Section 29825(b) criminalizes an individual unlawfully possesses a firearm in violation of any of the following civil [4] restraining orders - be they temporary, *ex-parte*, or permanent orders:

***20** • Domestic Violence Restraining Orders, Fam. § 6218;

• Civil Harassment Restraining Orders, Civ. Proc. § 527.6;

• Workplace Harassment Restraining Orders, *id.* at § 527.8;

• Protective Orders on Behalf of Postsecondary School Students, *id.* at § 527.85;

• Elder or Dependent Adult Protective Orders, Welf. & Inst. § 15657.03.

(West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess., and urgency legislation through Ch. 211 of 2023 Reg. Sess.).

Section 29825(b) is not historically rooted. As recently as 1987, California Penal Code Section 12021, the predecessor statute to Section 29825(b), made no mention of a prohibition on firearms for people subject to court orders. *See* Law of 1987, Cal. Penal. Code § 12021 (repeal operative 2012 and reenacted without substantive changes as Penal § 29825(b)).

Section 29825(b) provides for disarmament based on a host of different civil restraining orders. None requires a criminal conviction. Instead, by dint of the issuance of a civil protective order, a person loses their constitutional right to defend themself in their home against an armed intruder and can be prosecuted and ***21** jailed for the crime. Such a prohibition does not comport with our country's history and tradition of gun regulation. *Cf. Heller*, 554 U.S. at 628 (identifying the home as the place "where the need for defense of self, family, and property is most acute").

For our clients, these are not hypothetical concerns. We represent one client who was arrested in his home after police were called for a noise disturbance. Our client, a Black man, and his fiancé were home. Although police made no arrests for the disturbance, they arrested him under Section 29825(b) for possessing a firearm in his own home. An underlying restraining order prevented our client from contacting *his grandmother*, with whom he had previously lived. Our client no longer resided with his grandmother, nor was she present when police responded to his new residence. But state law criminalized our client's ability to defend himself against an armed intruder in his own home. He now faces

incarceration. Given disparities in police enforcement, Section 29825(b) operates to undermine the rights of Black individuals to defend themselves in their homes. *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 544-45 (2022).[5]

***22 B. California Law Is Broader Than Section 922(g)(8) Because it Expands the Definition of a Domestic Relationship and the Qualifying Conduct.**

Section 922(g)(8) criminalizes firearm possession after issuance of noticed domestic violence restraining orders and defines domestic violence as violence against intimate partners. Our state analog, Section 29825(b), also criminalizes gun possession after the issuance of a civil domestic violence restraining order. But in contrast to its federal counterpart, California's domestic violence protective orders enjoin a broad array of domestic and familial relationships - including non-intimate partners - as well as a broad array of non-violent behavior.

A DVRO is not triggered by a criminal conviction, but by an individual petitioner submitting forms to a court alleging domestic violence and requesting a restraining order. *See DV-100* at 2. Generally, a petitioner also submits a form requesting a Temporary Restraining Order ("TRO") until the official DVRO hearing can take place. *See DV-110, Temporary Restraining Order*, Judicial Council of California (Jan. 1, 2023), httpsy/www.courts.ca.gov/documents/dv110.pdf("*DV-110*").

To secure a TRO, a petitioner need only provide a declaration that shows "reasonable proof" of "harassment" and that "great or irreparable harm would result to the petitioner." Civ. Proc. § 527.6(d). A TRO may be issued without notice to the respondent. *Id.* If a court issues a TRO, the respondent will be ordered ****23*** entirely disarmed until the official DVRO hearing takes place - which by statute is supposed to occur within 21 to 25 days but in practice can be continued for far longer. *See DV-110* at 2; Civ. Proc. § 527.6(f). Thus, by a mere few forms, a respondent may be denied their arms without hearing for a period of 25 days and beyond.

When the DVRO hearing does finally take place, a court will issue a DVRO if it finds "a showing of past abuse by a preponderance of the evidence." *In re Marriage of Davila & Mejia*, 29 Cal.App.5th 220, 226 (2018), *as modified* (Nov. 19, 2018). The respondent will then be prohibited from possessing forearms for the duration of the DVRO, Fam. § 6304 - which typically last five years, but on renewal can be re-issued permanently. Fam. § 6345(a). The respondent must provide the court with a receipt demonstrating proof that all weapons have been relinquished. Fam. § 6304. Thus, a respondent may be permanently denied arms based on the issuance of a civil restraining order.

California has dramatically expanded the definition of a domestic relationship for the purpose of securing a DVRO. California Family Code Section 6211 provides that "domestic violence" is "abuse" perpetrated against, *inter alia*: (a) a spouse or former spouse; (b) *a cohabitant or former cohabitant, as defined in Section 6209*; (c) a person with whom the respondent is having or has had a dating or engagement relationship.... (f) any other person related by consanguinity or affinity within the second degree. In practice, courts have interpreted this to include relationships as removed as ****24*** grandparents, a child's spouse, or step-grandchildren. *See DV-100* at 2.

Added into law in 1993, Family Code Section 6209 defines a "cohabitant" as a person who regularly resides in the household. A "former cohabitant" is a person who formerly regularly resided in the household. *Id.* There is no minimum requirement regarding the length of relationship or cohabitation. *See id.* A related definition is found in California Penal Code Section 13700(b), which also allows for a cohabitant or former cohabitant to file a petition for a protective order.[6]

The qualifying conduct is likewise extensive. While the Penal Code, § 13700(b), defines domestic violence as causing bodily injury or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another, the Family Code provides an alternative, sweeping definition that can equally be the basis of a protective order. The breadth of domestic abuse under the Family Code includes".... *disturbing the peace of the other party*," defined as conduct that, based on the totality of the circumstances, *"destroys the mental or emotional calm of the other party.* " Fam. §§ 6320(a), (c) (emphasis added). The definition is unmoored to any physical violence and can

include conduct such as "coercive ***25** control," which itself includes "isolating the other party from friends." *Id.* at § 6320(c)(1).

It is difficult to imagine what sort of conduct would *not* qualify as domestic abuse under this definition. And upon a finding that the restrained party "destroy[ed] the mental … calm" of the petitioning party, a court can issue an order that triggers mandatory disarmament and immediate surrender of firearms, for all purposes. See *id.* at §§ 6320(a); 6389(a). A person whom a court has ordered disarmed is ordered to immediately relinquish their weapons and file a "receipt showing the firearm was surrendered to a local law enforcement agency or sold to a licensed gun dealer." *Id.* at § 6389(c)(2)(A). "Failure to timely file a receipt shall constitute a violation of the protective order." *Id.* This may also be grounds for a criminal prosecution under Section 29825.

The government's defense of Section 922(g)(8) should give the Court pause. If it applies to domestic violence, it applies to California's expansive disarmament laws as well.

***26 C. California Civil Protective Orders Prescribe Mandatory Disarmament Far Beyond Domestic Violence Scenarios, Including Private Disputes Between Neighbors, Employees, Students and Elder Dependents and Caregivers; Including on an *Ex-Parte* Basis.**

Like its federal counterpart, Section 29825 criminalizes firearm possession after issuance of a domestic violence restraining order. *Cf.* 18 U.S.C. § 922(g)(8), Penal § 29825. But unlike Section 922(g)(8), which is limited to domestic violence against intimate partners, California disarms individuals subject to the following civil restraining orders: [7]

• Civil Harassment Restraining Orders, Civ. Proc. § 527.6;

• Workplace Harassment Restraining Orders, *id.* at § 527.8;

• Protective Orders on Behalf of Postsecondary School Students, *id.* at § 527.85;

• Elder or Dependent Adult Protective Orders, Welf. & Inst. § 15657.03.

These orders generally require some showing of harassment, or reasonable cause to believe that the order will prevent future abuse, but they do not ***27** necessarily require physical violence. The showing varies by order. For example, in the context of Civil Harassment Restraining Orders - which typically apply where petitioners do not have domestic or legal relationships with respondents - a TRO may be issued where a court finds "*reasonable proof* of *harassment* of the petitioner by the respondent, and that great or irreparable harm would result to the petitioner." Civ. Proc. § 527.6(d) (emphasis added). The same "reasonable proof" standard applies where an employer seeks a protective order on behalf of their employee. *See id.* at §§ 527.8(e), 527.8(a). When a school employee at a postsecondary educational institution believes that a student has suffered a credible threat of violence, and that "great or irreparable harm" would result, that employee may seek a restraining order. *See id.* at § 527.85(e). Where an elder or dependent adult has been abused, they, or someone acting in their stead, may seek a protective order. Abuse includes treatment resulting in *mental* suffering, and mental abuse is grounds for disarmament. *See* Welf. & Inst. §§ 15610.07, 15657.03.

Like domestic violence restraining orders, these civil protective orders generally provide for mandatory disarmament. If a judge issues a protective order, regardless of whether a firearm was used in the commission of the conduct giving rise to the order, and regardless of whether the conduct occurred in the home, workplace or school setting, the restrained party shall surrender any firearms. *See* Fam. § 6389, Civ. Proc. Code §§ 527.6(u)(1)-(3), 527.8(s)(1)-(3), 527.85(s)(1)-(3); Welf. ***28** & Inst. § 15657.03(u)(1)-(3). [8] And this ban extends to prevent a restrained party from possessing firearms, even in the home for self-defense against an armed intruder. *See* Civ. Proc. § 527.9 (providing for the relinquishment of firearms by the subjects of restraining orders pursuant to Civ. Proc. §§ 527.6, 527.8, 527.85, and Welf & Inst. § 15657.03). If a person fails to immediately surrender their firearms, and they know of the order, they can be criminally punished and jailed. Penal § 29825(b).

Unlike 922(g)(8), these statutes disarm individuals upon the issuance of *ex-parte* temporary restraining orders. An *ex-parte* TRO under these statutes is effective for 21 days before a hearing is required - which can be extended to 25 days with good cause. *See* Civ. Proc. §

527.6(f), 527.8(g), 527.85(g); Welf. & Inst. § 15657.03(f). Moreover, a petitioner may continue the hearing with good cause, and a court may also continue the hearing on its own motion. *See* Civ. Proc. § 527.6(p)(1), 527.8(p)(1), 527.85(p)(1); Welf. & Inst. § 15657.03(n)(1). The TRO remains in effect during the continuance, and with it disarmament. *See* Civ. Proc. §§ 527.6(p)(2), 527.8(p)(2), 527.85(p)(2); ***29** Welf. & Inst. § 15657.03(n)(2). Given the availability of continuances, and the reality of congested courtrooms, there appears to be no meaningful limit on the length of time a petitioner may strip an individual's Second Amendment rights without a hearing. A neighbor can go into court and, upon an *ex-parte* showing of harassment and claim of irreparable harm, disarm his neighbor for 21 days, or longer, without that person being afforded an opportunity to respond.

The Court held long ago that deprivation of First Amendment rights, even for a minimal period, “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 374 (1976). Given the Court's command that the Second Amendment must be afforded the same majesty as the First, *ex-parte* disarmament based on civil restraining orders is of dubious constitutionality. *See* *Bruen*, 142 S.Ct. at 2130, 2156.

Permanent restraining orders may be issued after notice and a hearing. *See, e.g.*, Civ. Proc. § 527.6(j)(1) (entry of permanent order may last up to five years); *id.* at 527.8(k)(1) (entry of permanent order may last up to three years). This is significant because private citizens can use permanent restraining order hearings to deprive others of their Second Amendment right to self-defense for up to half a decade in some cases. And in the case of elder or dependent cases, the order may last indefinitely. Welf. & Inst. § 15657.03(i) (providing entry of a permanent order, after notice and hearing, for up to five years, and renewed “either for five years or permanently, without a showing of any further abuse since the issuance of the original order … “).

***30** California has already started sliding down the slippery slope of disarming individuals well beyond the confines of Section 922(g)(8). It provides *ex-parte* and permanent disarmament for ordinary, garden-variety civil disputes, including ones where no physical violence occurred. As a canary in the coal mine, we do not believe the Constitution is served by the government's argument, which would ratify, if not expand, this regime.

D. In Practice, California Restraining Order Hearings Lack Core Procedural Protections.

If restraining orders are a constitutionally sound way to deny someone their Second Amendment rights, as the government submits, they should at least be procedurally fair proceedings. They are not.

We represent people criminally charged with possessing firearms in violations of civil restraining orders. We also occasionally represent people in civil restraining order hearings. We are familiar with how these hearings occur. Despite the gravity of the rights at stake, in practice, basic due process is often missing from these hearings.

As discussed, nearly all of California's disarmament schemes can be issued *ex-parte. See, e.g.*, Civ. Proc. § 527.6 (permitting issuance of temporary protective ***31** order for twenty-one to twenty-five days).[9] As commentators have pointed out, “[i]n the majority of jurisdictions, these statutes permit the judge to enter an emergency protective order *ex-parte* the very same day without the defendant even being aware that proceedings are happening.” Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 Seton Hall L. Rev. 639, 644 (2010). Many of these statutes permit a court to re-issue the order past its statutory maximum duration if the petitioner requests continued protection. *See* Penal § 646.91(c)(4)(A) (allowing the petitioner to seek an order for continued protection). And, at the expiration of an emergency protective order, the protected party can apply for an *ex-parte* temporary restraining order that can last up to 21 days. *See* Civ. Proc. § 527.6(f); Penal § 18125.

In theory, these hearings should be occurring promptly. In practice, they are not. Courts are overburdened, respondents are not timely served, and resources are limited. Continuances are the norm and hearings are the exception. For example, we represent one person in a gun violence restraining order hearing where there have already been three continuances for witness availability and court congestion. The *ex-parte* order - originally issued for 21 days - will have deprived our client of his Second Amendment rights for over *six months*

before he has a full opportunity to ***32** defend himself against the government's accusations. Penal § 18195.

In a recent survey of civil restraining order proceedings in Alameda County, we saw few respondents represented by counsel, as they are not entitled to a *pro bono* lawyer. Respondents are sometimes absent often because they were unaware of any hearing. In many cases, this is due to the petitioner's failure to serve notice, resulting in routine re-issuance of TROs. In some other cases, respondents were allegedly served but failed to appear, and permanent orders may be issued as default judgments. Of course, a respondent's absence might not be willful. This could be because they are incarcerated - unbeknownst to anyone - and were not transported to a civil court proceeding.

When hearings do occur, there are few procedural guardrails. Hearsay is generally admissible in protective order hearings. *See, e.g.*, Civ. Proc. § 527.6(i); *see also San Diego Police Dep't v. Geoffrey S.*, 86 Cal.App.5th 550, 558 (2022), review denied (Mar. 22, 2023) (holding that hearsay evidence is admissible at hearings for gun violence restraining orders); *Kaiser Found. Hosps. v. Wilson*, 201 Cal.App.4th 550, 552 (2011) (holding that hearsay evidence is admissible at hearings for workplace violence restraining orders); *Duronslet v. Kamps*, 203 Cal.App.4th 717, 728 (2012) (holding that hearsay evidence is admissible at hearings for civil harassment restraining orders).

As a result, courts have stripped Second Amendment rights based on patently unreliable evidence that ***33** would never pass muster in an ordinary civil or criminal hearing. For example, in *San Diego Police Department v. Geoffrey S.*, a California appellate court affirmed issuance of a Gun Violence Restraining Order based on hearsay *descriptions* of the defendant's Face-book posts - the posts themselves were never admitted into evidence. 86 Cal.App.5th at 552, 564-65. That court also considered the hearsay statements of several individuals who had expressed concerns about the defendant, reasoning, “none of [them] had any evident reason to lie.” *Id.* at p. 566. It's unclear how that court was able to glean the motivations of the declarants without the benefit of their testimony.

Similarly, in, *Kaiser Foundation Hospitals v. Wilson*, a California Court of Appeal affirmed issuance of a work violence restraining order based on the affidavits and testimony of two individuals who recounted a series of troubling incidents, even though “it [was] not clear whether [they] witnessed any or all of these incidents, or, if not, how [they] obtained [their] knowledge of these incidents.” 201 Cal.App.4th at 553-54.

But there is a bigger problem with these orders, one of judicial incentives. There is almost no incentive to deny a petitioner a restraining order. As one commentator observed, trial judges are often personally invested in being overly cautious. After all, should they grant an unwarranted restraining order, the worst that will happen is an appeal. If, “on the other hand, the judge denies a restraining order and the plaintiff is killed or injured the very next day, sour publicity and an enraged community may very well ensure that the ***34** jurist's career will be both unpleasant and short.” Slo-cum, *Biting the D.V. Bullet*, 40 Seton Hall L. Rev. at 667.

This incentive structure pervades all civil protective orders in California. Our state even permits issuance of *mutual* restraining orders with certain findings. Fam. § 6305. As Judge Ho suggested in his concurrence in *Rahimi*, requests for mutual restraining orders challenge the very idea that one party needs protection from another. 61 F.4th at 466-67 (Ho, J., concurring). We have observed firsthand how mutual restraining orders are prone to manipulation and weaponization of a very important process, not to mention disarming the victim of domestic violence.

And dismissals of restraining orders are cautiously issued, even at the request of the petitioning party. ***See*** Joann Sahl, *Can We Forgive Those Who Batter? Proposing an End to the Collateral Consequences of Civil Domestic Violence Cases*, 100 Marq. L. Rev. 527, 545 (2016). Even having these orders on one's record can prevent the restrained party from getting a job, obtaining a professional license, or getting admitted to an academic institution. *Id.* at 529-32.

Domestic violence protective orders that mandate disarmament may reflect popular policy choices. But popularity has never been a factor in Second Amendment analysis. Like the First Amendment, which permits the “expression of extremely unpopular and wrongheaded

views," the Second Amendment "is the very *product* of an interest balancing by the people." *Heller*, 554 U.S. at 570, 635 (italics in original). It ***35** protects us all against a well-intentioned but constitutionally misguided popular majority.

The Framers never intended for complete disarmament after issuance of civil protective orders, whether for domestic violence, workplace harassment, elder abuse, or any other number of private disputes. But if the government's argument is taken seriously - the Second Amendment limited to "law-abiding" citizens and domestic violence protective orders deemed a sufficient finding of dangerousness to disarm individuals - states will only further encroach upon the Second Amendment. And they will have California's expansive disarmament scheme as a ready blueprint.

CONCLUSION

We urge affirmance of the judgment of the court of appeals.

Respectfully submitted,

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Footnotes

1 No party has authored this brief in whole or in part, and no one other than amici and its counsel have paid for the preparation or submission of this brief.

2 The historical evidence supports this. It suggests that the Founders were aware of England's Declaration of Rights - which limited the right to bear arms - and other narrower interpretations of the right to bear arms that were in circulation before the Bill of Rights was codified. *See* Stephen Hallbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms*, 194, 205, 251, 310, 312 (2d 2019). But none of those versions ultimately made the cut. *See* *U.S. v. Skoien*, 614 F.3d 638, 648 (7th Cir. 2010) (Sykes, J., dissenting).

3 *Skoien*, 614 F.3d at 646 (Sykes, J., dissenting).

4 In addition, Section 29825(b) provides for criminal penalties for violation of *criminal* protective orders under California Penal Code Sections 136.2 and 646.91. Pre-trial criminal protective orders are issued in every domestic violence case we have seen, and result in disarmament prior to conviction. Penal §§ 136.2(a)(1)(G)(ii)(I)-(II), 136.2(c)(2)(d)(1)-(3).

5 California's gun regulation has discriminatory origins. Before 1967, open carry of loaded firearms was legal and common in California. California enacted laws barring open carry in large part to disarm the Black Panthers. Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 San Diego L. Rev. 947, 969 (1999); *see* 1967 A.B. 1591 (Penal § 12031).

6 For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time. Penal § 13700(b). Factors establishing cohabitation include the nature and length of the relationship, joint ownership of property and shared expenses, among other things. *Id.*

7 California also has gun violence restraining orders, commonly called "red flag laws," which allow people such as police and family members to petition for the disarmament of citizens. Penal § 18100 *et seq.* These may be issued *ex-parte.* Penal § 18150(b)(1). These, too, raise a host of constitutional problems.

8 There is a limited exemption to disarmament in the Family Code, mainly for peace officers, and only after a psychological examination and if they cannot be reassigned. Fam. Code § 6389(h). Elder or Dependent Adult Protective Orders exempt disarmament where the finding of abuse was made solely based on "financial abuse." Welf. & Inst. § 15657.03(u)(4). And in some other contexts, a court may make a special finding that a firearm is necessary as a condition of respondent's continued employment. Civ. Proc. Code § 527.9(f).

9 *Ex-parte* emergency protective orders only last for approximately seven days. Fam. at §§ 6250(d); 6256(a)-(b); Penal § 646.91(g).

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